One case, a jury was picked but never sworn. That's it. In all 46 of the other -- 45 of the other cases, the cases were resolved before trial without a jury being summoned.

I would like to compare this for Your Honors with my experience in my other cases. Only about half or less than half of my clients are asbestos death victims. I represent clients in everything from commercial disputes to physical injury cases. In a recent breach of contract case that I resolved in Dallas, Texas, I would have thought it would have been a routine case. It took 20 discovery hearings by the judge. There were 15 different dispositive motions that were heard. I tried the case for eight weeks before it settled.

In Corpus Christi, I recently resolved an electrocution case. That case had four days of hearings on discovery matters, two motions for summary judgment, five additional hearings. It took me three years and two months for that case to resolve.

We should be applauding the asbestos system in Texas, not trying to change it. No cases settle or are litigated more smoothly in the state of Texas than our asbestos cases. This system ain't broken. Don't try to fix it, please.

I would like to now discuss what I expect is going to happen to my 26 cases that are set in the next 8 months. And I understand that Mr. Phillips stood up and said, "Hey, look, we're just here about Rule 13." Like Mr. Budd said, "If we were here about three cases, we wouldn't all be here about three cases."

Rule 13 says that the Rule 11 judges, which they are seeking to appoint or seeking to have appointed, are to consult with the Rule 13 judge. And I expect that the Rule 11 judges in the eight regions where Union Carbide wants them, if they are appointed, will hear that phrase loud and clear many, many times. Make no mistake. What Union Carbide wants is eight regional judges that will all respond to one Rule 13 judge. What they want is ultimately all asbestos cases to pass through one judge, like all the Dallas traffic going through one tollbooth. It can't possibly be just or efficient.

Here's what's going to happen. This is what I expect is going to happen. If you-all reach a decision and you decide to adopt a Rule 13 judge, within 24 hours, I expect that some paralegal from one of these law firms will file a motion for continuance in the *Franks* case. The *Franks* case is the case of

Joe Franks. He worked at a refinery in Texas City for 30 years. He went to Santa Fe High School. He got a degree from Rice. He was diagnosed with mesothelioma in 2002. I filed his case in September of 2002. It's set for trial January 24th, 2004, less than six weeks from now. Not one dispositive motion has been filed in that case, not one. Union Carbide hasn't filed any motions in that case.

Barring a decision, a Rule 11 or a Rule 13 decision by this Court, that case will resolve, and the other 26 cases set in the next 8 months will resolve like every other one of my cases has resolved just before trial or right at trial. But if there is a decision here that appoints a Rule 13 judge, you can rest assured that there will be a motion for continuance filed.

And if that motion -- and what the defendants will say is, they'll say, "Hey, there's been an MDL appointed. We're trying to get a Rule 11 judge appointed in Galveston. Wait. Don't hear the *Franks* case. We've got common issues to be heard," even though none have been filed. And maybe the *Franks* case makes it through. Maybe the continuance is denied in that case. But the *Douma* case set in -- but the *Douma* case set in February gets continued or

the *Monk* case set in March gets continued while they say, "Hey, we need a Rule 11 judge." So now they've got a Rule 11 judge.

And I don't have much time, so I'm sorry I'm going a little faster.

But so now we've got a Rule 11 judge. Well, now they're going to say, "Judge, you can't decide this motion for continuance. We've just established an MDL. You've got to consult with the Rule 13 judge."

And there isn't even a Rule 13 judge yet. And now we've got to get all the cases physically transferred to the Rule 13 judge. And then the Rule 11 judge, who has to hear the motion for continuance, is going to be sitting in Houston, not Galveston. And how can he decide the motion for continuance in the *Franks* case without the file?

So then he's going to ask for the file, so the file is going to be boxed up and shipped to him. How long is that going to take? A motion to transfer venue takes three to six months. How long will this take? And then we're going to set up a system, a system that requires consultation between a Rule 11 judge and a Rule 13 judge.

First, you've got to set up liaison

counsel. How long does that take? Two months? Three months? Then you're going to have discovery. Coordinating discovery among 100 lawyers in law firms, how long will that take? And then there will be the motions, and there just won't be one motion.

Your Honor or maybe Judge Peeples, I think it was, asked the question: Why will there be any incentive to relitigate these issues? The reason is -- as dark as it may sound, the reason is very simple: As long as cases aren't going to trial, cases aren't getting resolved. If cases aren't getting resolved, the defendants aren't paying any money. There is an incentive to delay.

But moreover, Rule 13 says no cases are to be remanded for trial until the purpose for which the MDL has been established is resolved. They're going to argue to both the Rule 13 judge and the Rule 11 judges: "We just established this MDL to hear common issues. No common issues have been heard yet. You can't remand the cases until common issues have been heard," common issues that were never filed in the cases to begin with. It's going to be a mess.

While we talk -- and I'm going to conclude now by saying this: While we talk about Rule 11 and Rule 13, we must not forget Rule 6, which

says that civil cases should be resolved within 18 months when reasonable. The system we have now is reasonable. My cases have resolved within 8 to 18 months. We're meeting our goal. There is no way that this system can meet its goal.

Y'all have to decide this issue of whether this new system would be just. If it were just, we would expect a couple of things. If it were necessary, we would expect a couple of things. One, you would expect that all of these defendants would be lining up with these people saying, "We need this system." You don't have that. Mr. Tipps' law firm represents other asbestos defendants that haven't signed their name to this pleading, and you have to ask yourself why.

If this would be just and efficient, if it was necessary, why isn't there one of your brethren, why isn't there one appellate court decision saying: "The system is broke. We need to fix it"? There isn't. Not one trial judge has come forward and said, "The system is broke. We need to fix it."

And finally, there isn't one plaintiff who says this system would be fair. There's no argument that the system would be fair for plaintiffs because it isn't. It can't be just. It can't be

efficient. And the cases won't get resolved, but they are now.

Thank you.

Any questions? I'm sorry. I'm out of time. Thank you.

RESPONDENTS' ARGUMENT BY MR. GREG JONES

MR. JONES: May it please the Court. My name is Greg Jones. I'm a partner with Franklin, Cardwell & Jones. We represent a class of plaintiffs that we have designated as oilfield plaintiffs. We filed a response in this case, even though we don't have any post-September 1 cases.

And when we appeared before Judge Peeples in the Region 4 hearing, I stood up, and the first thing I said was, "I'm confused," and I have to admit to you that I remain confused. And the reason I'm confused is because I thought I heard Mr. Tipps say in his opening remarks words to the effect that this Court has no jurisdiction over cases filed before September 1, 2003. And the implication was: Why are we even here? All of us that filed cases before September 1, 2003, why do we care? What issue do we have?

The issue that we have, frankly, is concern that Rule 11 is going to be, in essence, done

away with. Judge Hecht has said in his comme
the Supreme Court Advisory Committee that the
"There's no reason why the Court couldn't say,
wanted to, that any proceedings that are being
conducted under Rule 11 after September 1st w
transferred to the judge selected by the MDL pa

So that means that my cases, whi
very, very different than the cases that these
lawyers handle, it means that my cases will be
a single judge. There will be liaison counsel
appointed for both plaintiffs and defendants,
different defendants. And we've got four defend
in our cases, and we've got one plaintiff's lawy
I'm the liaison counsel in our 166 oilfield cases
are filed across the state of Texas in 6 differe
regions.

Now, let me just tell you a litt
about why these cases -- why I say these cases a
different. Union Carbide manufactured a produc
end use called Visbestos and Super Visbestos al
with Phillips 66 -- the subsidiary, Phillips 66.
product was used as an additive between 1965 and
to drilling mud. You could not work in the oilf
of Texas during that time period without workin
these products. It came in 50-pound bags. It

be carried into a mud hut, a hopper -- it would be dumped into a hopper. And these 50-pound bags would be ripped opened with a screwdriver or a knife and dumped into a hopper, and these men would spend hours breathing and swallowing pure asbestos.

Now, why do I say they're different if it involves asbestos? Jim Powers in Brownsville last -- at the last hearing said, "You know, Mr. Jones is right. His cases are different, but they're the same." And the commonality really only is that it's asbestos. Because there is no other case -- no other product that Union Carbide makes in our cases except drilling mud additives. They're simple. They're straightforward. They're products liability cases. There's no conspiracy theory, no fraud, no premises. Just a products liability case.

And yet, if there is this Rule 13/Rule 11 scheme put into effect, we're going to be buried in paper from all of the motions filed by 104 different defendants, from all the plaintiffs that are being dealt with, and we're going to have to look at that paper because we're going to have to make sure that there are no issues decided by the Rule 13/Rule 11 judge that impacts our case.

For example -- for example, Mr. Tipps

mentions Garlock's chrysotile defense. Garlock has filed motions in other state courts that say, "Gosh, chrysotile doesn't cause disease, doesn't cause lung cancer, or mesothelioma."

Well, the reality is that the only asbestos that my clients have been exposed to was chrysotile, because both products by Phillips and by Union Carbide was pure chrysotile. That's all they were exposed to, because we made sure that their only work history was in the oilfield during 1965 to 1985. But nevertheless, I will be required to respond to that motion and others like it, even though it's not relevant -- it's not relevant in terms of the other cases because the exposure and the product use is different.

We don't need liaison counsel in my cases. We have offered to Union Carbide to do Rule 11 administrative judges, preassignment of judges. We offered that before all of this started, and we were rebuked. We were told, "No. We want to go through the process."

And Mr. Tipps in direct response to a question by Judge Hester, where he says to Mr. Tipps: "Messrs. Rosenthal and Baron in their brief suggest that, in the absence of statewide coordination of the

proceedings, not even Union Carbide suggests t
Rule 11 assignment would be beneficial. Do y
with that?"

And Mr. Tipps said: "We clear
instituted these proceedings as a coordinated
and the arguments that we have made in support
Rule 11 motions presuppose that we get Rule 13
as well. I can't say there would be -- it's no
short-term benefit to coordination under Rule
within a particular region, even if there were
prospect for long-term benefit under Rule 13.
given the fact that the applicability of Rule 1
limited, and it applies only to cases presently
pending and will not apply to any future cases, I'm
not really here asking the Court to grant our Ru
motions in a vacuum, if that's responsive to the
Court's question."

So he tells Judge Hester on the one hand, "We don't really care too much about Rule because what we really want is Rule 13." And the comes here today and says, "You don't have jurisdiction over my cases." So that's why I'm confused. I don't know how -- I don't know what asking for. I don't know how it's going to work it worries me.

And I would -- I would ask the Court to seriously consider Ms. McCally's suggestion, and that is, to step back. Judge Peeples has already appointed an administrative judge -- assigned an administrative judge in Region 4. He's invited the oilfield worker cases to file motions to be separated out. We're going to take up that invitation and step back and let that process work and work its way out because it will work.

We don't need the problems that are going to be created in this interaction. We don't know how it's going to work, and the results will be inevitable delay, and that's not fair.

Thank you.

MR. SIEGEL: I'm Charles Siegel from Waters & Kraus. Apparently, I'm told we have 18 minutes left. We would respectfully --

JUSTICE KIDD: Is that about right?

JUDGE PEEPLES: I have 16.

MR. SIEGEL: Sixteen.

JUSTICE KIDD: It's close enough.

MR. TIPPS: Your Honor, we would be happy to give him 18.

JUDGE PEEPLES: You have 18 left.

MR. SIEGEL: And what we would like to

ask the panel, if it meets with the panel's approval, is this: The movant opened for 25 minutes, and they've got 65 minutes rebuttal, including rebuttal by people who haven't yet spoken, at least Mr. Elliston and maybe Mr. Thackston. I don't know if he's going to argue or not.

We would ask that the panel give us -- I take my 18 or 16 in surrebuttal. I understand they're the movant. Maybe they should get the last word, and maybe they can take some of their 65 and give themselves a surrejoinder or whatever it is that comes after surrebuttal. But we -- I would ask that if that meets with the Court's approval, that I be allowed to go after some portion of their presentation. If not, I'm prepared to proceed obviously.

JUDGE PEEPLES: I'm sure we could meet some of that. Go ahead.

MR. SIEGEL: Okay. Well, then shall I sit down and allow them to --

JUDGE PEEPLES: Why don't you go ahead and say what you want to say, and let's see what they say.

MR. SIEGEL: Fair enough, okay. Fair enough. Thanks very much, Judge Peeples.

RESPONDENTS' ARGUMENT BY MR. CHARLES SIEGEL

MR. SIEGEL: The point I want to [illegible] has been made by other people who have spoken [illegible] claims for the plaintiffs, but I do want to amp[illegible]n it and expand on it just a little bit in the ti[illegible] have left, and it is about delay. You've heard al[illegible]f our side say that, and I want to explain as best [illegible]n why we believe that to a moral certainty, why we believe that deep in our bones, why we're scared [illegible] death of this proceeding, why our clients are sc[illegible] to death of it.

It's like H. L. Minken said: "When you hear somebody say it's not about the money, you know it's about the money." When you hear Union Carbide say, "It's not about delay," you know it's about delay. And why are we so convinced of that? Why is delay so important to us?

Mr. Kaeske did a wonderful job of explaining the terrible effects that delay could have on his clients. Our firm also primarily represents mesothelioma claimants, a small number of them. We confront this situation every day. In the *Kwasnik* case in El Paso, which is the case Union Carbide relies on to show some asserted difference of opinion on this chrysotile issue that Garlock brings up,

perfect example. A 56-year-old man died of mesothelioma. We fought as far as we could to get him a day in court before he died, and that was achieved. He died on day three of his trial, but at least he died knowing that his family was going to be taken care of because we had a trial date. The trial date was continued once, but because we had a trial date, the defendants were able to -- we were able to secure some settlement for him.

It has occurred to me that it's not just the plaintiffs saying this, that you can look back in asbestos litigation in the recorded and the published opinions about asbestos litigation and see very prestigious judges saying this. Judge Wolin, Alfred Wolin who probably now has more asbestos litigation in front of him than any other judge in the country -- he's the federal judge appointed by the Third Circuit to oversee several asbestos bankruptcies -- said this: "An asbestos-related injury is often a devastating and fatal occurrence requiring prompt judicial attention. Therefore, a posthumous award, while easing the family's burden of loss, provides little solace or comfort to the injured plaintiff." He said that back in 1988 in a case called *Campolongo v. Celotex.*"

A lot more recently, Judge Parker in the *Arnold* case in the Fifth Circuit said, "What is certain -- a lot of contentions are made, but what is certain is that delay very deleteriously affects claimants with mesothelioma or lung cancer or asbestos-related pleural disease."

The Supreme Court of Texas in its most recent case on asbestos litigation -- one of its most recent cases, the *Pustejovsky* case, said, "Mesothelioma claimants typically die within 7 to 15 months of diagnosis after suffering terrible pain and disability." In that case also, the Supreme Court of Texas said, "Asbestos is the one mature tort that we have. The system works for this mature tort."

Last but not least, one of the most colorful quotations I thought of off the top of my head last night, the *Wedgeworth* case, a case decided 20 years ago by the Fifth Circuit. The Fifth Circuit said, "The grim reaper has called while judgment waits." That was said 20 years ago by the Fifth Circuit. It hasn't changed.

Mesothelioma claimants still face a terrible obstacle. When they're diagnosed, they secure legal counsel. They try to bring suits. We try to give them their day in court before they die.

If they die before their day in court comes -- happened, by the way, with one of the original cases that was the subject of Union Carbide's m That person already died. He died a few weeks the motion was filed, Giuseppe Cappelli, one of clients. It looks like the way his disease progressed, we wouldn't have gotten his case to t But you can see what happens in these cases.

How do we know? Why are we so s How do we know that delay is what this is really about? We know for two reasons: The unsettled that they talk about are really not unsettled is and we know it because of their prior behavior b the bench.

What are these unsettled issues that they assert require all -- require stopping this system that we have in Texas and funneling all of these cases into one judge so we can finally have some rulings on these questions that have plagued Texas courts throughout the years? What are these asserted issues?

The bulk supplier defense. Our side has already talked about that in our response. In our consolidated response, we talk about three orders denying this motion in asbestos cases that Union

Carbide filed a motion in. Typically, they don't even file it.

And the Court should recognize that Mike Kaeske's experience is a very -- is a very striking and demonstrative one and a telling one. Mike Kaeske's cases are very, very serious seven-figure injury cases. Union -- these are not cases that Union Carbide just pays some pocket change in and goes away. They're asking -- the plaintiffs are asking for lots of money in those cases.

Why isn't Union Carbide filing these motions? We don't know. But now that they've had an opportunity to funnel all cases into one judge's court, they say, "Well, maybe we'll get around to filing a bulk supplier defense motion."

Ms. McCally pointed out that case, that issue, is going to have to be resolved by the Texas Supreme Court anyway. The chrysotile motion, that's nine to two currently in favor of the plaintiffs. Both of those two, by the way, have asterisks. One of these is the case I mentioned in El Paso, the *Kwasnik* case. The judge didn't strike the plaintiffs' experts. He didn't strike -- he didn't grant summary judgment to the defendant. He simply made a ruling about certain evidence that could and could not come

in.

The *Gilcrease* case, a San Antonio case, I feel compelled to respond very briefly to what happened in that case. We were ambushed on the day of trial by that motion. It was the first time that motion had ever been brought. We lost it.

But Judge Speedlin recognized very, very quickly that we had been ambushed, and she said, "Well, I'll grant reconsideration, and you can have a full hearing on this two weeks -- or two months from now." We did reset the case. We refiled it in El Paso.

They made their arguments to the judge about it being the law of the case. That judge still may -- is going to consider the motion on its merits. He simply said it was not the law of the case because Judge Speedlin had in a sense vacated her prior order or had at least agreed to have it reconsidered -- or to have it reconsidered. Other than that, there is no order granting Garlock relief.

If this were -- if this were a controverted disputed issue that we needed a one final authoritative ruling on, perhaps they would have filed. Perhaps they would have come before you pointing to one order somewhere where this motion had

been definitively granted. It hasn't.

And more telling, has Garlock itself -- Union Carbide is saying here's an issue out there that Garlock needs resolution on, but Garlock itself hasn't even joined in this motion. Garlock doesn't feel that it needs an authoritative one-time resolution of this motion. It doesn't at all. It hasn't joined this motion, and I think that should be telling to the panel.

Forum non conveniens is not mentioned by Mr. Tipps in oral argument so far but discussed in their moving papers. The record on that is something like 40. One of the two orders they cited in their favor in their reply brief, a case called *Kochankovski*, one of our cases, that was an agreed order. He didn't say that in the reply brief. But if their counsel, Mr. Livingston, is in the courtroom, he'll have to confirm that. That was an agreed order. So it's really about 41 on that issue. Is that really a disputed issue? No, it's not.

Finally, nonparty discovery, the suggestion that now because of the change and the proportionate responsibility statute, there's going to be all of this discovery that has to take place over these new parties that are all of a sudden going to be

crowding into the verdict form. The law did change in that respect. Now those parties can go on the verdict form.

But it should be known that for one thing, assigning causation to the bankrupt party, to the bankrupt asbestos companies, it's not going to require a lot of new discovery because, of course -- let's take Owens-Corning, which is now bankrupt, but was defending this litigation for 30 years before they went bankrupt. They're -- they've been discovered to death. There is no more discovery that could be done about Owens-Corning or Pittsburg Corning or any of the other companies that are bankrupt.

The plaintiffs' employers -- many of these plaintiffs are employed by a few employers that are already in this litigation. Shell and Exxon, those are employers as to many claimants in the litigation, and they're already in the litigation. There's already an immense amount of discovery that's been done with those -- with those companies.

Now, some plaintiffs are employed by much smaller companies or mom-and-pop operations or what have you, but that's all individualized. How a single judge can, quote, oversee that discovery, that's meaningless to us. That doesn't mean anything.

What is there to oversee?

If one of Mike Kaeske's clients was employed by a mom-and-shop auto mechanic -- mom-and-pop auto mechanic shop in Tyler, Texas, or wherever, how does having all of those infinite number of individual situations flogged up in front of one judge make sense? It doesn't. That's not something new. That's not some new opportunity that Rule 13 can streamline things on. That proves the opposite. Those are individualized issues.

And then to the extent we're talking about the bankrupt companies, they've already been discovered. There's no more discovery to be done on those entities. So we don't take these common issues seriously. We find it hard to believe that they really want litigation -- or resolution of common issues. And, again, the telling facts are in front of you.

Have they ever gone to the Dallas County asbestos judge and said, "Judge, let's have a one-time motion for summary judgment on our Calidria defense, on our bulk supplier defense"? No.

Have they asked for a standing order in Galveston, because, you know, there are 200 cases pending in Galveston, and things are out of control in

Galveston? No. Have they asked for it in Bra[illegible] County? No. Have they ever moved for a sing[illegible] resolution of a single issue in the federal MD[illegible]at has been pending for 12 years? No. Their answ[illegible]is: "Well, we weren't a target defendant until two years ago."

First of all, I can assure you that as they are in Texas, represented by Thompson & Knight and Baker Botts and other very capable firms with squadrons of lawyers, Union Carbide has not been lying around for 20 years simply paying money to plaintiffs. They have been actively defending these cases.

This witness -- the one example of a witness that they can put forward as a person who's been deposed too many times and maybe we ought to have one blanket deposition for all times, well, that man has been deposed 30 times because they've been in the litigation for 20 years. They're not some peripheral defendant that's been off on the sidelines for 20 years, and all of a sudden, now they're in the plaintiffs' cross hairs. That's nonsense. They're a huge company. They're represented by many, many very capable and resourceful lawyers, and they could have been filing these motions, and they haven't been.

And even if you say, "Well, now they've

been a target in Texas for two years." Well, what have they done for two years? Did two years ago, they ask for Rule 11 consolidation? No. Did they ask for a standing order in Brazoria County? No. Did they bring a dispositive motion in any one of Mike Kaeske's big dollar cases? No.

It's impossible for us to take it seriously, and we implore you not to take it seriously because it really is about delay. And let's assume for a second that their motives are benign, and they don't want to simply clog up the dockets and have these cases and these plaintiffs literally die on the run. Let's assume that that's not really what they're after, despite all of this evidence to the contrary. But that is what will happen.

We've, the plaintiffs have -- all of us have groped for a different analogy to use, funneling all the traffic on the Dallas tollway through one tollbooth -- through one tollbooth, trying to make the Austin water supply flow through one garden hose. Last night, I was thinking, you know, it's as if we have 10,000 people at any given time at the DFW airport trying to get through the metal detector to get their plane -- get to their planes, and all of a sudden, you take out 49 of the 50 metal detectors, and

they all have to go through one metal detector. No one will get to their plane. That's what they want. They want it for obvious reasons. It's good for them. That's why -- that is why they're asking for it.

Delay works for them, and it is terrible. It is absolutely terrible for our clients. An asbestos-related injury is often a devastating and fatal occurrence requiring prompt judicial attention. That won't happen.

If all of a sudden the cases that are now being handled by hundreds of judges, are handled by one judge, that judge may be the most well-meaning, industrious, full-time, 24/7 judge there could be. But how could -- how could these people ever obtain justice? And if the system was dysfunctional, if there was something palpably unfair about the present system, then maybe it would be understandable. But they haven't demonstrated that.

And what I want to conclude with, and hopefully I have a few minutes left after this, is Mr. Tipps' use of the word "unjust." "The system is unjust." What is there unjust about the present system? What ruling have they pointed to that seems palpably unfair?

As Mr. Budd pointed out, the vast

majority of these cases are processed in sys
every single trial judge is a conservative R
where every member of the Court of Appeals i
conservative Republican. And, of course, the
the Texas Supreme Court available as well, w
about which the same must be said. So how is
system denying them justice?

I object to the use of that wor
the system is unjust. I want to see some pr
that. I want to see some proof of Union Carbi
taken to the cleaners in some out-of-the-way
where they can't get justice. There's nothing
that. Nothing like that has been -- has been
to you in the way of evidence.

I hope I have, whatever I have,
more minutes left. I would like to reserve the

Thank you.

JUDGE PEEPLES: Three.

MR. SIEGEL: I'll use three the
Thank you.

JUDGE PEEPLES: Mr. Tipps?

MR. TIPPS: Your Honor, we have
five minutes to Mr. Thackston and would like t
him a chance to address the panel. I have a f
responsive remarks, and Mr. Elliston has a fe

responsive remarks, and we do not intend to use all 63 minutes that we have remaining.

MOVANT'S REBUTTAL ARGUMENT BY MR. ROBERT THACKSTON

MR. THACKSTON: May it please the Court. My name is Robert Thackston. Since the late 1980s, I've represented dozens of companies that have been sued in asbestos litigation throughout Texas, and although actually I'm not here to talk about any of them specifically today. I doubt that the plaintiffs' lawyers will deny that I am counsel of record in a case that they have filed right now.

I want to take up the invitation that was just extended to point out to the Court why things are broken. I would like to cite to the Court what Chief Justice Brister -- at the time Chief Justice Brister of the 14th District Court of Appeals in Houston wrote about 30 days ago. Justice Brister wrote: "Twice in the last ten years, the Supreme Court of Texas has granted the extraordinary writ of mandamus in circumstances just like these here -- those here. Both times, the Court intervened in asbestos litigation when the trial court compelled discovery relating to products the plaintiffs never used for time periods they were not employed," quoting *American Optical* and *Texaco v. Sanderson*.

And I quote Chief Justice Brister: "In this asbestos discovery dispute, the trial court compelled discovery relating to products the plaintiff never said he used for a time period 15 years before he was born. Rather than invite the Supreme Court to answer this question a third time, we grant relator's petition for mandamus." That's *In re Sears Roebuck*.

Justice Brister also wrote -- and this is the problem. This is why it's broken. This is why that discovery rules -- and Mr. Budd said, "Well, they want to relitigate things that were decided 20 years ago." Well, I'm not quite sure what was decided 20 years ago. I've only been doing this since 1988 or so. But I know whatever I know that's been decided in the last 12 years don't apply to the people that are being sued today.

The discovery that was crafted for -- Johns-Manville in the 1970s makes a little sense to the toy manufacturer who gets sued for the first time ever in Texas and is told they have to answer all discovery about all products they ever manufactured. Don't listen to me. Listen to Chief Justice Brister, quote: "Discovery requests must be reasonably tailored to the case. The discovery requests here were tailored to asbestos manufacturers, and thus

often needed extreme makeovers to fit Sears. Repeatedly during the hearings (and to some ex still in this court,) the plaintiffs had to ma and stitches more indicative of battlefield su than tailoring." That's what Chief Justice Br said about trying to apply the old rules to the n situation, and that was *Sears Roebuck*, and that of the companies that I represent.

Is this an anomaly? Well, about later, Justice Hecht wrote an opinion in a case *In re John Crane*, and he had granted a petition writ of mandamus involving discovery disputes ove asbestos litigation. So obviously, it's not a well-oiled machine. It's a well-oiled machine when you have rules that nobody can understand in cou like Dallas County where I practice and Harris Co where I practice, where there have been -- there' patchwork of case management orders that I defy a to explain to you this morning on a given point.

I try asbestos case law every day. I try them in other parts of the country. And tell you that when you go in, the courts expect a issues to be resolved, but they're not resolved. the reason nobody else is up here, I will tell y very candidly, is for fear of retaliation. Tha

you put your name on this, all of a sudden, there are 40 plaintiffs' lawyers who can put you in a bunch of lawsuits tomorrow morning and not very many people have the stomach for that. Rightly so.

I've been told that somebody will have a press conference tomorrow. They'll announce that they're going to sue my client in 1,000 asbestos cases, and their stock will drop. And you can go explain to my client why that happened.

And there are very good reasons why certain defendants would not want to put their names on certain motions like this. And only when a company has been sued as much as Union Carbide, they can stand up here and say, "Something has got to change." And what's got to change is that these issues that are fundamental, like how discovery is conducted, they need to be consistently handled throughout the state.

And one other thing I wanted to mention is, what is a very common practice in asbestos cases is for the plaintiffs to notice a deposition in the case that's not even filed yet. There's no lawsuit. And so where do you go to move to quash that? You don't have a judge. You don't have a case number. There's nowhere to go. Or they may file the lawsuit. You know, we have a rule that governs that, by the

way. Rule 202 says it governs expedited depositions, but that's rarely ever followed. I haven't seen one attempt to file that in the last five or six years. But they may file the lawsuit and then serve the deposition notice before the defendants even have an opportunity to answer.

Now, in this -- I've got a list here of 40 times that that's happened in the last two years, so it's not an anomaly. It's something that happens all the time. In fact, it's the regular practice with some plaintiffs' firms when they get a mesothelioma case.

And what does that mean? Well, that means that they go -- in the case they have, sometimes if they don't provide a letter from a doctor -- which presumably would be very easy to get if the person is dying of mesothelioma. It presumably would be easy to get a letter from a doctor saying, "This person is terminally ill and needs to give a deposition in the next 30 days." You never see those.

And presumably, you would be able to give the other side all the information that you have about the products, and why you're suing them. We get answers to standard discovery, which is -- which amazingly, you'll hear when we answer standard

discovery and every single question is a stand
so-called approved discovery, every single on m
will have objections to them. How can you ob
standard discovery? If it's standard and you
supposed to answer, how can you object to it?
that routinely happens.

So the net result is that on the videotapes that's going to be shown to the jury e plaintiff gets the story -- gets to tell their y to the jury. And some defense lawyer, sometime e, is sitting there with a file that has the name the person and maybe their trade, and you have no discovery. You have no idea -- you have no opportunity to know what the allegations are. You have no opportunity to investigate.

You have no opportunity to talk to your client about whether or not they did that, certainly no opportunity to go to an expert and say, "What do you think about this?" That's what the jury is going to see. It's the most pernicious practice imaginable. It happens in courts all over the state all the time, and there's no way for us to stop it on an individual court basis. This is a perfect example of why the MDL was created, to implement a statewide rule that says, "When you have a mesothelioma case, here's what you

need to do. Get a letter from a doctor. It should be easy. Provide the defendants with this." And so, that is why there's a critical need for a statewide rule governing these expedited depositions.

Finally, for every anecdote plaintiffs' counsel will have about the particular sympathetic cases they have, we have those too, cases where someone was diagnosed with mesothelioma and did an expedited deposition. Discovery was served on a Ricoh defendant never before sued in asbestos litigation. They were ordered to provide information that would cost hundreds of thousands, if not millions, of dollars, numerous discovery hearings that were overruled every time. "Do it. It's always been done. Provide this information."

We didn't make the products. It's hard for a company that's been in business for 120 years to tell you what was in the apron that they were selling in the 1920s. "We don't have that. Do it anyway." And then we find out that the person doesn't even have mesothelioma. And that's like executing somebody and then saying, "Well, we're sorry." And where was the procedural protection along the way?

When you say the word "mesothelioma," it does not mean that it was caused by asbestos, first

of all, and it doesn't mean that it was caused by asbestos from a product of whoever was sued. And there are elements of proof, and Justice Brister in the *Sears* case makes that point. Just because somebody has been diagnosed with mesothelioma doesn't mean you throw out the window all the rights of whoever they decided to sue.

Johns-Manville is not around anymore. Most of these people were in the Navy. They were exposed heavily to asbestos in the Navy for 20 years. When they get out, they unfortunately get this disease and sue the person that made the hair dryer that their wife used. That's fine. That's their right to do that.

But these lickety-split rules that put you to trial in six months don't contemplate a company being sued for selling a hair dryer that really needs to do some discovery to find out why it is that the plaintiffs think that a hair dryer caused this mesothelioma in a guy who was exposed in the Navy for 20 years. And also, by the way, who's the expert who's going to say that, and does that expert opinion rise to the standard that *Havner* requires? All of those issues need to be decided, and they should be decided in state court.

So I hope I haven't gone over [illegible]ve minutes. I appreciate the Court's indulgence.

MOVANT'S REBUTTAL ARGUMENT BY MR. STEPHEN TIPPS

MR. TIPPS: May it please the Court. I would like to divide the responsibility of Union Carbide's part responding to the points made by the plaintiffs between me and Mr. Elliston. As the Court appreciates, I'm not an asbestos defense lawyer by trade. Mr. Elliston is. And so I want to try to address the issues that I feel are within my expertise and then leave to Mr. Elliston the responsibility for addressing some of these issues relating to exactly what the problems are with the way in which asbestos litigation is currently being handled.

Let me start with Ms. McCally's suggestion that we have effected a complete shift in position, which really ties in with Mr. Jones' protestations that he's confused about what we're doing. What I have tried to do today is to present an argument relevant to our Rule 13 motion. In San Antonio and Brownsville, I tried to present an argument that was relevant to our Rule 11 motions. This Court has jurisdiction only with regard to Rule 13.

We do seek Rule 11 treatment from the

presiding judges. We have outlined in our Rule 11 motions two alternatives that the presiding judges could pursue if they choose to grant our motions; one being that each would appoint a judge under Rule 11 to handle cases within his region. Alternatively, we have raised the possibility that the presiding judges, if they choose to do so, could avail themselves of Rule 11.3, and ask Chief Justice Phillips to appoint the judge whom this panel might appoint under Rule 13 or to assign that judge to their region so they could then make that person also a Rule 11 judge. That is an alternative, but it's an alternative that this panel cannot control. That's up to the regional presiding judges in consultation with Judge Peeples in his capacity as the chair of this panel.

So whether or not at the end of the day Mr. Jones' clients in cases filed before July 1 end up with their cases in a court presided over by the judge who was also the Rule 13 judge, with all due respect, is not for this panel to decide, because this panel has no jurisdiction with regard to those cases. Jurisdiction there lies only with the presiding judges.

JUSTICE KIDD: Along those same lines, can I ask you a question and share with you some of my

concerns?

MR. TIPPS: Sure.

JUSTICE KIDD: I take it that you are asking for a single statewide judge?

MR. TIPPS: In this proceeding under Rule 13?

JUSTICE KIDD: Yes.

MR. TIPPS: Yes.

JUSTICE KIDD: I mean, why is it that you think that Rule 13 only envisions a single judge?

MR. TIPPS: It used the word "pretrial court" in singular. I'm not --

JUSTICE KIDD: As opposed to "courts"?

MR. TIPPS: Right. I mean, the rule says "court" singular, not "courts" plural. I'm not prepared to say that this Court could -- this panel could not interpret Rule 13 to allow it to transfer cases to multiple pretrial courts when that was the efficient and just thing to do. I would not urge that Court -- that course on this Court because I'm concerned that if this Court chose to go in that direction, that we would end up with a system that is no better and no better coordinated than we could have had under the old Rule 11.

I'm concerned about coordination, and

I'm especially concerned about the fact that that approach would lose for us -- lose for all litigants in this asbestos litigation what I see as a window of opportunity for a single Rule 13 judge within the near term, with respect to cases that are not trial-ready, rather cases that are newly filed, to do some things, to put a standing order in place, to make some rulings that will streamline the whole process.

JUSTICE KIDD: My concern is: This is a big state.

MR. TIPPS: It is a big state.

JUSTICE KIDD: We've got 13 appellate districts -- intermediate appellate districts with 14 intermediate appellate courts. We regionalize everything in this state. And you're asking for a single judge to oversee all of the pretrial proceedings statewide in all of these cases prospectively, I understand.

But as your motion as drafted indicates, you would seek to consolidate the Rule 11 cases with the Rule 13 pretrial court. So, in essence, you're talking about past cases as well as prospective cases.

The legislature just got through eliminating our visiting judge program. So now you're

asking, and you're asking this Court, to appoint an active judge so that he can consolidate both the 11 and the 13 cases under one pretrial court. I mean, as a practical matter, it looks like that's just almost impossible to accomplish.

MR. TIPPS: That's one thing that I'm asking. That's not the only thing that I'm asking, and I'm not saying that the Court necessarily has to do that in order to improve justice and efficiency. I sort of feel like that my position --

JUSTICE KIDD: Well, you can get it down to nine, and you would like to get it down to one, and you're saying that something in between is better than nothing at all?

MR. TIPPS: Well, here's what I tried to say, and if I have not said this plainly enough, I apologize to the Court and opposing counsel. We are -- we are asking this panel to appoint a single judge under Rule 13. That judge will initially have a small docket of Rule 13 cases. That docket will grow over time. In our view, there will be things that judge can do efficiently and fairly in the short term while this docket is small that make some sense.

Separately, we have asked the regional presiding judges under Rule 11 to consider granting

the Rule 11 motions so that there can be coordination with what's going on under Rule 13. We have -- I mean, I have -- in my papers and in my argument, I have striven to make it clear to the presiding judge before whom I have appeared that I'm not necessarily saying that they should take my alternative two, which is to ask the chief justice to appoint the Rule 13 judge in those regions so that instantly the Rule 13 judge will have all these cases. That may be the wrong approach, and I defer to the judgment of the presiding judges concerning whether that is what we ought to do. Maybe the better approach would be to have a Rule 13 judge and eight regional judges, whose dockets necessarily would dwindle and disappear over time, coordinating with the Rule 13 judge.

One problem in the argumentation that we've heard from the plaintiffs, it seems to me, is that there seems to be a serious underestimation concerning the ability and capability of the pretrial judges who would be assigned by this panel under Rule 13 and by the presiding judges under Rule 11. Whoever gets this job is going to want to do a good job and is going to want to bring greater efficiency and greater justice to this process than we currently have now. I have that much faith in the judiciary of

Texas, and I'm sure this panel does too.

Those judges are not going to let interminable delay occur. Those judges are not going to let plaintiffs dying of mesothelioma never get their day in court. There are many tools available to Rule 13 judges and Rule 11 judges. They can appoint masters. They can decide that the pretrial procedure has been accomplished with regard to a particular case.

Rule 13.7(b) specifically says under the caption "Remand": "The pretrial court may order remand of one or more cases when pretrial proceedings have been completed to such a degree that the purposes of the transfer have been fulfilled" with regard to that particular case.

If one of Mr. Kaeske's cases gets filed next month and is tagged to the pretrial court, Mr. Kaeske can appear before that judge and say, "Judge, none of these pretrial proceedings that you're contemplating here are needed in my case. My case needs to be tried. I have special circumstances." That's within the discretion of the pretrial court to accomplish.

So, and finally, with regard to Ms. McCally's suggestion that, "Well, Judge Peeples

has granted my motion in the Fourth Region, so Judge Peden is going to be the assigned judge in the Fourth Region. Let's just see how that works out. Let's kind of use that as an experiment." Well, I would suggest that it would be a far better experiment for this Court to grant the Rule 13 motion to assign a judge the task of handling these cases, relatively a manageable number that grows over time, to try to get some things done in the next few months that will improve the way the system works and see how it's working out.

My belief is -- I think there's reason to believe that bringing greater order to the way in which these cases are handled will result in more efficiency and more justice so that the time demands on the judge go down rather than go up. But if it's a total bust, if dockets or backlogs are growing, if this is just not working at all, it's certainly within the power of this panel, just as it can transfer cases, it can un-transfer cases. So if the Court is looking for a way to try something out, I would suggest that to be a better -- a better approach.

But I want to make sure that you understand, Judge Kidd, that we're not proposing a single fix. What we have tried to do is to take the

legislation that's available to us in House Bill 4 and the two rules that the Supreme Court has promulgated, Rule 13 under House Bill 4 and the preexisting Rule 11, and present to this panel and present to the presiding judges the various alternatives that are legally available that are within the jurisdiction of those respective decision makers, so that they can bring their judgment to bear concerning how we can use procedures that are available in order to make this asbestos litigation run more smoothly.

A handful of other things: With regard to the -- Ms. McCally's handout concerning the federal cases, I have not had a chance to read those cases this morning. My colleague, Ms. Maddux, tells me that most of those federal cases that are included in that brochure in which MDL treatment is denied are cases in which the case was trial-ready, and the discovery had been accomplished.

With regard to the bulk supplier issue, I think Mr. Siegel corrected Ms. McCally. Union Carbide has filed bulk supplier motions. Union Carbide raised the bulk supplier issue in a case that Jim Powers tried in Judge Hanks' court a little over a year ago. He didn't go with us on those issues, but we certainly have been pursuing those issues.

It will be interesting to see w
Supreme Court does in the *Gomez* case and the
case. It may well resolve all the issues. It
well be good for Carbide. It may be bad for C
Carbide's issues are not identical to those is
It's an issue that we need to have resolved. My
belief is there are similar issues that other
defendants need to have resolved and that the R
procedure would allow that to happen.

With regard to the proportionate responsibility issues, yes, Ms. McCally is righ Everybody knows that Johns-Manville is bankrupt. Everybody knows that Owens-Corning is bankrupt. b these defendants, these current -- this current crop of defendants needs to put together the liabili against Johns-Manville and Owens-Corning. They have that right. It's a matter of due process. That' going to happen.

Whether we have consolidation coordination or not, this group of defendants is to avail itself of the new proportionate responsibility statute. It's going to conduct discovery in order to get that case put together. There are going to be legal issues that come up. know that's going to happen, and we're simply

suggesting that that provides a -- that that's another very good reason that we ought to have coordination and decisions by a single judge.

Garlock, of course, has filed a letter in support of the UCC motion, and, frankly, I'm not sure what -- that I understand the distinction between joinder and whatever it is that they did.

I've run through my list. Are there other questions that the Court has of me before I ask Mr. Elliston to take the floor?

JUDGE PEEPLES: Thank you.

MR. TIPPS: Thank you.

MOVANT'S REBUTTAL ARGUMENT BY MR. GARY ELLISTON

MR. ELLISTON: May it please the Court. My name is Gary Elliston. I'm with the law firm of DeHay & Elliston in Dallas. Very briefly, exceedingly briefly, I hope, I will address just a few of the issues that have been raised by plaintiffs' counsel in their arguments.

By way of background, I graduated from law school, SMU, in 1978. In 1979, I began to handle my first asbestos personal injury case. So I've been involved in this litigation for approximately 24 years and represented members of the Asbestos Claims Facility in the '80s, the Center for Claims Resolution

in the '90s, and a number of defendants currently in litigation. I'm here on behalf of Union Carbide today. It's fair to say I have won and lost maybe more than my share of cases to most of the plaintiffs' lawyers that are arguing on the other side.

I want to address the central point raised by Mr. Budd that the system works. It ain't broke. Don't fix it. This system is broken. It hasn't completely broken down, but it is broken, and there are things that we can do to fix it that weren't available to us before, and that's why Union Carbide is here today. Because under Rule 13, under the MDL, we now have an opportunity to streamline and standardize the process. We can eliminate, or at least reduce, some of the duplicative discovery. We can reduce some of the inconsistent pretrial rulings. We can save an enormous amount of time for the local judges in trial courts. We can reduce the burden on the litigants, the lawyers, and on the system, and on the courts.

For one thing, the defendants will actually be able to get many of these issues ruled upon at pretrial, and that's one of the issues that we face. If you look at the pretrial -- if you look at the pretrial standing orders, most of them work

backward from the trial date. If you look at the Dallas County standing order, the plaintiffs do have to produce the plaintiff for deposition under 90 days before trial. Let me word that a little differently. The plaintiff must be produced for deposition at least 60 days before trial.

What happens in virtually all of these litigation, because the deadlines work backward and they're relatively short, the vast, vast majority of the discovery gets done at the last minute within the last 60 days. Something that you would not all see in any other type of litigation occurs in this litigation. Because the discovery is done late, we face exceedingly large dockets, 50 or 60 or 100 cases set on a single docket with plaintiffs being produced for deposition 60 to 90 days before trial. You can imagine the extreme amount of discovery that occurs at the very last minute.

It is traditional, although there are exceptions, that motions for continuance are ruled upon the day of trial. Motions for summary judgment, no-evidence summary judgment motions generally are ruled upon either the Friday before trial or the day of trial. As a practical matter, many of these pretrial rulings don't occur because we are not given

that opportunity until the very last moment.

Under Rule 13, we have the opportunity to have judicial economy; not speed at the expense of fairness and justice, but real judicial economy here where we could save time, and I want to give you one or two brief examples. This year, 2003, I've tried two mesothelioma cases to verdict on behalf of Union Carbide. One was a household exposure, a housewife who claimed exposure to Calidria, the chrysotile fiber that was mined by Union Carbide where the allegation was that the fiber was in a joint compound that her husband worked with. She had mesothelioma. It was tried in a Dallas County court, Judge Roden, against Waters & Kraus, Peter Kraus, a very, very fine trial lawyer.

A second case was tried here in Austin, who was a drywall worker who claimed that he was exposed to Calidria through a joint compound. In both of those cases, we urged the positions, many of which should have been raised at pretrial -- we would have liked to have raised at pretrial, but instead, those pretrial rulings were not had. And during the trial, we spent extensive amounts of time arguing motions in limine.

Now, the motions in limine are

interesting because much of that evidence goes back 15 to 20 years. Some of those motions, I have been arguing in courts for the last 15 years. Some of those are absolutely new because of the differences in the litigation, because we don't have product -- thermal insulation product manufacturers anymore. We now have premises defendants. We have friction product manufacturers. We have encapsulated products. We have employer claims. The issues are different. Many of these issues that we argued in the limine motion were completely different than things that we had argued five years ago or ten years ago.

But we challenged the experts under *Havner/Robinson*. We challenged the experts, so we had hearings on virtually every one of the experts in these cases. We had hearings. We challenged the scientific reliability of much of the medical evidence that the plaintiffs were going to put on, and we heard those challenges during trial.

Much of these are general issues that could be handled by a pretrial judge once and for all, but instead, we held -- we argued this during the trial. The admissibility of testimony from other cases, which will become a much bigger issue under the third-party responsibility law now, because many of

these depositions have been taken. Much of this has been done with regard to Johns-Manville and Owens-Corning Fiberglas and Celotex and many of the bankruptcies.

But those depositions were taken 15 or 20 years ago when none of the current litigators were there. There will be issues about admissibility of testimony. There will be issues about the discovery, but we face those issues in these cases. I want to say, again, some of these issues were new. Some of these issues were recent. Some were 15 years old. Between those two judges, many of the rulings were the same. Some were different.

In those two cases, the judges ruled against us on a number of issues that I would like to have an appellate court look at. We were very fortunate in both of those cases. We received defense verdicts in both of those cases, and the plaintiffs decided not to appeal those points. So we will not have an opportunity to get an appellate court to rule upon those. But, again, we were the day of trial arguing those motions.

And the next case that comes up, we will have those motions heard again. We will have those challenges again. There will be yet another

trial court that will spend 10, 15, or 20 hours ruling on these.

And I submit to the panel that it would make far more sense, accomplish far more judicial economy, to have a pretrial judge hold those hearings where the rulings could apply statewide, where the parties could come in, and they could all put on their best evidence, their best case, and have the judge rule, rather than have each individual trial judge rule as they have a jury standing in the hallway waiting to come in, or the trial judge having these hearings at eight o'clock in the morning before we start evidence at 8:30 or having these hearings at lunch, because that's what occurred in each of these cases.

Now, I will say that at least one of these judges complained to us about: "Why didn't you raise these at pretrial?"

And the response at the time was: "Judge, if we raise these at pretrial, the motions get pushed back to the day of trial." We filed the motions, but the motions get heard at trial. So to have a pretrial judge that can rule on many of these general issues, it will allow us to save an incredible amount of time for the local trial courts.

Under Rule 13, we have the opportunity to streamline, to standardize in a just and efficient manner, to have these tremendous savings. One of the things that we have talked about is a statewide standing order. Yes, there are a number of jurisdictions that have standing orders, but those standing orders differ from jurisdiction to jurisdiction.

One of the points that Mr. Thackston made, and he's absolutely correct, those standing orders were negotiated or agreed to by parties 10, 15, or 20 years ago that are no longer in litigation, that don't have the interest that these litigants do.

Now, the issue about Galveston County, there has been an effort to get a standing order in Galveston County for over a year, and what has transpired is that the parties cannot agree on the provisions. And Judge Garner is going to have to go forward and rule on a number of those issues, but there's been an effort ongoing. There's been discussions in Brazoria County, and the judges in Brazoria County have not been receptive to a standing order in that jurisdiction.

But with a statewide standing order, we can standardize the pleadings in short form and

fashion. We can standardize the written dis[illegible]
We can standardize some of these exhibit list[illegible]get
rulings upon issues like privilege and hearsa[illegible]
authenticity.

The Noerr-Pennington doctrine a[illegible]ies to a number of the exhibits that the plaintiffs wish to use. We can get rulings on the witnesses, *Daubert/Robinson/Havner* challenges. We could have some jurisdiction-wide depositions that would apply to all of our cases. We could get some rulings on the admissibility of some of this historical testimony.

We've talked about motions. You've heard a lot about the bulk supplier motions, but there are a lot of pretrial issue motions that can't be heard that should be heard on medical causation issues; whether, in fact, asbestos causes cancer at sites in the GI tract; whether chrysotile, in fact, causes mesothelioma; whether Calidria, the short pure form of chrysotile mined by Union Carbide, causes mesothelioma; whether Calidria causes any type of disease; a review of the current medical literature that discusses whether, in fact, five -- less than five microns can cause any type of disease so that products made with that type of fiber can be a cause of disease. The limine motions, the choice of law

issues, there are numerous issues that can be decided by a pretrial judge that should be decided.

One of the issues that I would like to briefly address is the opportunity to have coordinated trial dockets where a pretrial judge can certify cases for trial that they're trial-ready; where we have deadlines tied not to the trial date, but tied to when it is filed; with the appropriate standard disclosures and requirements for witnesses to be tendered and independent medical examinations to be given and pretrial motions to be ruled upon. Because the timing of the discovery is one of the big issues for the defendants in the litigation, but, of course, with priority provisions, where people with excellent circumstances can get to trial in a timely fashion so that we have manageable numbers of cases set for trial in the individual courts.

One of the issues that's been raised is the parties have been able to work out most of the discovery issues, that we work together. That is something that I'm very proud of. I make no apology for working in a professional manner with the plaintiffs' lawyers to resolve as many issues as possible so that we're not at the courthouse every week.

I've known Mr. Budd since he started practicing law. I've known him since he joined Mr. Baron, and I have a deep appreciation and respect for him and consider him to be a friend. I work very hard not to get into gotcha games with plaintiffs' lawyers. But the fact that we make the best of this system, the fact that we act in a professional manner under the system that we have, should not be used against us, and my client should not be prejudiced because we attempt to operate and work in a professional manner.

I think all of the arguments have really been made, and I don't want to remain up here and just repeat things that have been said before. But true judicial economy for asbestos litigation in this case -- in this state allows us to obtain our discovery in a timely fashion with a coordinated trial docket where cases are ready for trial before they're scheduled for trial, and that's a part of the reason that we ask for this relief.

Thank you.

JUDGE PEEPLES: Anything else from the defendants, Mr. Tipps?

MR. TIPPS: Nothing further, Your Honor.

JUDGE PEEPLES: I'll give the plaintiffs the three that you've got, plus seven more, for a total of ten.

MR. SIEGEL: Thank you very much, Judge. Mr. Kaeske is counsel from the plaintiffs' side that's going to make the rebuttal, if that's satisfactory.

I just wanted to say, to make it clear, I was not aware -- I somehow missed -- I did not see the letter from Garlock joining the motion. So I further state that that was obviously wrong. And I can assure the panel we're not retaliating against them for that, nor would they have -- nor would they fear us very much, I think, in that regard.

So Mr. Kaeske will do the rebuttal.

RESPONDENTS' REBUTTAL ARGUMENT BY MR. MIKE KAESKE

MR. KAESKE: May it please the Court. Your Honors, please, don't let the perfect be the enemy of the good. I borrowed those words from Mr. Budd, but I think that they are exactly true. Does anybody think that an MDL system would be 100 percent perfect in every case? 99 percent of all issues are worked out among the plaintiffs.

Mr. Elliston pointed to two cases. He's got two disputes. Not one of my cases is ever

involved in any of these disputes. Two out of 30,000 cases. Mr. Thackston, who isn't being paid by a client to stand here and speak to you today, mentioned two cases out of 30,000 cases where there's a problem. This is not a broke system.

What I heard loud and clear from these three gentlemen was: "We don't like the decisions of the trial court judges." That's what they said. "We're not getting our motions heard early enough." That's a trial court judge's decision. "The judges are making the wrong decisions in discovery issues." That's a trial court judge's decision.

We're not standing here arguing that the pretrial judges that might be appointed won't be good judges. They will be good judges. They're arguing that they've made all the wrong decisions, but they've pointed to Justice Hanks who's cured that problem in at least one case.

They have remedies. All cases are subject to appeal. Mandamus can happen in any sort of case, not just in an asbestos case. That there have been mandamus decisions that are resolved in favor of the defendants is a good thing. If the decision was wrong, the decision was wrong. But good judges make wrong decisions, and bad judges make good decisions.

And we all know that that happens, and that's why we've got you-all to ultimately make the right decisions.

We don't need to change the whole world of asbestos because we think that we're going to get a different judge that we might like better. What happens when they don't like the decisions of that pretrial judge? Then they're going to want another layer. And that's really all that we are hearing is that "We're not satisfied with the decisions we're getting. We want different decisions from different judges."

If Union Carbide is a new player in the asbestos litigation, which they aren't -- there's no doubt about that. There's no dispute, I think, really -- why don't they avail themselves of the system that exists first before they try to change everything affecting tens of thousands of people?

You heard Mr. Budd say that the last two common-issues hearings in Dallas were canceled because nobody showed up with anything to be heard. If they're concerned that their pretrial motions aren't getting heard soon enough, why don't they go to Judge Hall and ask him to change it? Why don't we have a hearing about whether or not there should --

there should be a different discovery process [illegible] of when the plaintiffs get deposed or when pre[illegible] motions are heard or whatever?

Mr. Hendler pointed out to me tha[illegible] case that Mr. Elliston was talking about where [illegible] motions didn't get heard on time, the motions we[illegible] filed before trial, one day before trial. They [illegible] filed a day before trial, and then they're asked [illegible] heard, and then he complains because they weren[illegible] heard.

And when they win, they won the t[illegible] right? When they win, they still complain. Whe[illegible] have a wrong decision in the trial court and it g[illegible] to a justice who fixes the problem, they still complain. No system is going to be perfect, none

But look at the numbers. And by "the numbers," I mean, look at the number of cases that are resolved in the system that we have. Look at the amount of time that it takes the cases to be res[illegible]l, and look at the real amount of time that the tri[illegible] court judges spend having to wrastle this bunch [illegible] lawyers, myself included. The time is minimal.

Instead, what we're going to do is we're going to set up new judges to hear the iss[illegible] that they think have been decided wrongly befor[illegible]

again. And this claim -- and this is one of the -- one of the things that bothers me the most, I think, because of my particular position and my client's particular position. One of the things that bothers me most is this claim that, "Well, Mr. Kaeske's cases can be remanded because they'll be ready for trial." They will never ever agree that my cases are ready for trial.

The only motions, Your Honor, that are ever heard in my cases almost exclusively are motions for continuance, and I get them in every single case. Not because the cases aren't ready, but because the cases don't want to be heard, because they don't want the cases to be heard.

If Mr. Tipps would stand up right now before you and say, "We're going to let mesothelioma cases -- or the exigent cases, we're going to agree that those cases are ready for trial," it's not going to happen. They'll argue to you here today that the cases can be remanded. But on the next day, they'll refer to Rule 13, to the same portion of Rule 13 that Mr. Tipps read, the portion which says: "Cases should not be remanded for trial until the reason -- the purpose for which the MDL was established has been resolved."